Black Entertainment Television, Inc. ***and*** **Kimberly R. McCord.** Case 5–CA–24066

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 17, 1996, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief. The General Counsel also filed cross-exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge, for the reasons he states, that the General Counsel established that union activity was a motivating factor in the Respondent's decision to lay off 13 employees and reduce the work hours of a 14th employee on August 23, 1993. We also agree with the judge, for the reasons he states, that the Respondent would not have taken the same action in the absence of the union activity of the employees involved.

Thus, the judge's analysis is consistent with the analytical model for cases alleging acts of discrimination set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Further, the judge's analysis, and his inferences that the Respondent's motives for laying the employees off were pretextual, are entirely consistent with the court's comments on *Wright Line* and its application by the Board in *Southwestern Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1342–1344 (D.C. Cir. 1995). We therefore find no merit in the Respondent's exception that the judge made a ''clear misapplication of the burdens of proof.''

In addition to the reasons stated by the judge for rejecting various defenses, we also rely on the Respondent's shifting explanations. The Respondent asserted in its position statement submitted to the Board in November 1993 that it needed fewer employees because it reduced the production of ''Our Voices.'' The Respondent asserted at the March 1996 hearing and thereafter that it not only reduced production of ''Our Voices,'' but it also canceled ''Love Between the Sexes,'' and ''Story Porch,'' and reduced production of ''Heart and Soul,'' in December 1992, and that these changes also contributed to the Respondent's decision to lay off, or reduce the hours of, employees. Similarly, the Respondent asserted in its position statement that alleged discriminatees Karen Mitchell, Dorothy Monroe, and Kimberly McCord were laid off because of their poor performance or disciplinary problems. Yet at the hearing and thereafter, the Respondent asserted that all the alleged discriminatees were assessed and found wanting pursuant to Production Manager David Faulks' ''skills matrix.'' Faulks himself testified that he assessed skills by observation and ignored disciplinary records. ''The Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.'' *Sound One Corp.*, 317 NLRB 854, 858 (1995) (citation omitted). Accordingly, we find that the Respondent's failure to carry its rebuttal burden is supported not only by the reasons stated by the judge, but also by the Respondent's shifting defenses discussed here.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Black Entertainment Television, Inc., Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Steven Sokolow, Esq. and *Nancy Gottfried, Esq.*, for the General Counsel.

William G. Miossi, Esq. and *Donn G. Meindertsma, Esq.*, of Washington, D.C., for the Respondent.

DECISION

MARVIN ROTH, Administrative Law Judge. This case was heard at Washington, D.C., on 9 days during the period from March 11 through April 15, 1996. The charge was filed on November 24, 1993, by Kimberly R. McCord, an individual. The complaint, which issued on November 30, 1993, and was amended on May 5, 1994, alleges that Black Entertainment Television, Inc. (the Company or Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The gravamen of the complaint, as clarified by counsel for the General Counsel, is that the Company allegedly threatened its employees with loss of employment or other reprisal, made other coercive statements, impliedly promised increased benefits and improved conditions, laid off or reduced the hours of 14 named employees, and reduced

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel cross-excepted to the judge's inadvertent error in finding that the Respondent reduced production with certain programs in January 1993 rather than the correct December 1992 (''Love Between the Sexes,'' ''Story Porch,'' ''Heart and Soul''). We correct this inadvertent error.

the hours of 37 other employees, all in reprisal against, or to discourage support for International Brotherhood of Electrical Workers, Local 1200, AFL–CIO (the Union). Respondent's answer denies the commission of the alleged unfair labor practices.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and the Company each filed a brief.

On the entire record in this case,[1] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs of the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a District of Columbia corporation with an office and place of business in Washington, D.C., is engaged in the production, sale, and distribution of cabled television programming. The Board has plenary jurisdiction in this matter.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union Organizational Campaign, the Company's Response, and Alleged Violations of Section 8(a)(1) Prior to the Representation Election*

In about March 1993, the Union commenced an organizational campaign among the Company's approximately 60 technical (engineering department) employees at the Company's Washington, D.C. facility.[2] In mid-May, the Union filed a petition for a representation election among those employees. On July 16, the Board conducted such election. The Union won, and was certified as bargaining representative. As of the present hearing the Union was still bargaining representative, although the Company and Union never reached agreement on a contract.

The evidence fails to indicate that the Company had knowledge of the organizational campaign prior to receiving formal notice of the election petition. Indeed, the testimony of employee witnesses indicates that some employees did not learn of the campaign until shortly before the petition was filed.

At about the same period of time as the Union's campaign, organizational activity was taking place, involving a different or different unions, and nontechnical employees. The present case does not involve allegations of discrimination against nontechnical employees (charges involving such allegations were severed from the present case and disposed of by settlement or otherwise). However, the Company's response to the Union's organizational campaign was not limited to the technical personnel. The present complaint does include allegations, and the General Counsel presented evidence, concerning alleged unlawful statements and conduct involving nontechnical employees.

Following notice of the election petition, the Company retained Labor Relations Consultant Dave Parmenter to assist in countering the union campaign. The Company formulated a facilitywide program known as ''Team BET,'' Robert Johnson, who is chairman and CEO of BET Holdings, the Company's parent corporation, and is the Company's top official, testified in sum that Team BET was developed as a strategy to counter the Union's organizational effort. Therefore, I do not credit the testimony of then Executive Vice President for Network Operations Jefferi Lee, which he later retracted, that Team BET was unrelated to the organizing campaign.

As part of the Team BET program, the Company conducted meetings and discussion groups led by management and supervisory personnel. Initially, these meetings and discussions were conducted for technical employees but, subsequently, nontechnical employees were brought into both.[3] The discussions focused heavily on differences and problems between management and employees, which presumably gave rise to the organizational campaigns. Management and supervisors repeatedly argued that the Company and employees should resolve such differences and problems together, rather than for the employees to seek aid through unionization.

In addition to the meetings and discussion groups, the Company increased and systematized its use of question-suggestion boxes. In the past, management responded to employees' questions and suggestions in an informal and irregular manner, if at all. However, during the preelection period the Company issued weekly newsletters in which vice president Lee purported to respond to numerous employee questions, suggestions, and criticisms.

During the 2-week period immediately proceeding the election, the Company declared a production hiatus. Production ceased, except for certain necessary ongoing activities, such as news programs. Historically, the Company has had hiatus periods, usually in June or December, during which periods unit employees would perform maintenance work, or take their vacations. However, the July 1993 hiatus was devoted to Team BET meetings, discussions, and other Team BET activities. I find that this was not a routine production hiatus, and that the principal purpose of the hiatus was to enable the Company to rally facilitywide opposition to unionization.

As part of the Team BET program, the Company distributed or made available to facility employees, black T-shirts with white lettering, bearing the logo ''Team BET.'' Union supporters countered by wearing red T-shirts. The complaint alleges that the Company, by Vice President for News and Public Affairs Deborah Tang and other supervisors, ''restrained, coerced and interrogated its employees,'' in violation of Section 8(a)(1), by distributing the Team BET shirts ''bearing statements opposing Union activity, and by encouraging its employees to wear those shirts.''

Vice President Lee testified that he did not regard the wearing of a Team BET shirt as indicating whether the employee was for or against the Union. The evidence indicates

[1] By orders dated August 2 and September 11, 1996, I corrected the official transcript of proceeding in certain respects.

[2] All dates herein are for 1993 unless otherwise indicated.

[3] I will sometimes hereafter refer to technical and non-technical employees respectively as ''unit'' and ''non-unit'' employees.

otherwise. On July 15, the day before the election, the Company conducted a breakfast meeting for all facility personnel at the Four Seasons Hotel. Some 300 to 400 personnel were present. Many employees wore Team BET shirts. A smaller number (some 25 to 30) wore the red (prounion) shirts. Most of those who wore the red shirts sat together. One employee wore a shirt which appeared to be a combination of both. CEO Johnson, who addressed the meeting, noted the employee. Johnson commented: ''It seem like we've got some ambivalent people here.'' (Johnson's testimony.) It is evident that Johnson understood that the Team BET shirts were intended to demonstrate opposition to unionization.

Nonunit personnel were under particular pressure to wear the Team BET shirts. Joel Westerberg and Sonja Goins were then employed as assistant producers. Vice President Tang was their supervisor. Westerberg and Goins testified in sum that prior to the election, Tang told her staff (including Westerberg and Goins) that she wanted them to wear the Team BET shirts until the election in order to show the technical staff that they were with the team.

Some of Tang's staff wore the Team BET shirts, but Westerberg and Goins did not. Goins testified in sum as follows: On July 19, in response to a summons from Tang, she went to Tang's office. Tang asked why she didn't wear the shirt. Goins answered that she didn't believe in Team BET. Tang asked whether she liked the Company and her job. Goins answered that she like both. Tang said: ''we don't know what your position is with the Company.'' Tang added that when the production staff gathered around to talk and Goins just listened and said nothing, ''it's like you're on their side.''

Ernest Champell was employed as an assistant producer from September 1990 until July 20, 1993. Campell testified in sum as follows: On returning from vacation during the preelection period, Vice President for Entertainment and Original Programming Cindy Mahmoud asked him if he had gotten a T-shirt. Champell answered no, whereupon Mahmoud offered to get him one and did. Champell asked if he had to wear the shirt. Mahmoud answered that he did not, but could if he wanted.

Counsel for the General Counsel presented Vice President Tang as an adverse witness. Tang testified that to her knowledge, Team BET was unrelated to the Union's organizational campaign. As indicated, I do not credit such assertions. Tang testified that the T-shirts were placed in the conference room for employees. She initially testified that she did not talk to employees about the shirts. She subsequently testified that she told employees that they were available and that she would like them to wear the shirts. She further testified that after the election, she asked two employees why they did not wear the shirts. Vice President Mahmoud was not called as a witness in this proceeding. I credit the testimony of Westerberg, Goins, and Champell.

The Company laid off Goins on August 23. Goins filed an unfair labor practice charge which was subsequently settled. On August 28, Goins and Champell went to the Mall in Washington for a march commermorating the 30th anniversary of the 1963 Civil Rights March. There they met Senior (Supervisory) Producer for News and Public Affairs Richard H. Perkins, who had worked with Goins and knew her socially. Goins testified that Perkins told her he was sorry to hear she was let go, that ''if you'd only worn that damn T-shirt, you could have kept your job,'' and that Tang could have found another place for her within the Company if she had worn the T-shirt. Champell testified that Perkins told Goins she was fired, because she didn't wear the T-shirt, she would have her job if she wore it, Tang was mad at her because she didn't wear it, and changed her evaluation for this reason.

Supervisor Perkins, who was presented as a company witness, testified that he did not tell Goins that Tang would have found her another position if she had worn the T-shirt. Perkins was equivocal with respect to the balance of the alleged conversation. He testified that he did not recall telling Champell that Tang changed Goin's evaluation, because she did not wear the T-shirt. However, he did not deny saying this to Goins. Perkins further testified that he did not recall saying that Goins would still have her job if she had only worn the T-shirt, but if he did, it would have been a joke. Perkins did not deny speaking to Goins about the circumstances of her layoff, and he did not testify as to what if anything he actually told Goins. In light of Perkins' equivocation, I credit the testimony of Goins and Champell.

Evidence involved in a settled case may properly be considered as background evidence in determining the motive or object of a respondent in activities occurring either before or after the settlement, which are in litigation. *Steves Sash & Door Co. v. NLRB*, 402 F.2d 676, 678 (5th Cir. 1968), Moreover, the pertinent complaint allegation is not on its face, limited to conduct directly involving only unit employees. Therefore, I have taken into consideration the credited testimony of Goins, Westerberg, and Champell with regard to this allegation.

It is undisputed that during the election campaign the Company provided and made available, the Team BET shirts for all of its Washington facility personnel. The credible evidence fails to indicate that the Company told any employees that they had to wear the shirts.[4] The Company encouraged unit employees to wear the shirts, but did not subject them to the same degree of pressure as nonunit personnel. Among alleged discriminatees, Karen Mitchell testified that about a week before the election, Company managers told the employees that wearing the shirts was a sign of commitment to the Company. Dorothy Monroe testified that the managers (Lee, Redmon, Tang, and then Production Manager David Faulks) were present when the shirts were made available, and told the employees they should wear the shirts to show unity. Samone LeMieux testified that the Company handed out the shirts to employees. Lee, Redmon, Tang, and Faulks, all of whom testified in this proceeding, did not deny the testimony of Mitchell, Monroe, and LeMieux.

An employer may lawfully, and in a nondiscrimanatory and noncoercive manner, make proemployer paraphernalia available at a neutral location where the employees are not under the surveillance of management. However, it is unlawful for a supervisor to engage in the distribution of such paraphernalia, or a fortiori, to encourage or pressure the employ-

[4] Charging Party McCord, a unit employee and alleged discriminatee, testified that director of engineering Jonathan ''Rick'' Redmon, who supervised the unit employees, said that the employees had to wear the shirts. However, in her investigatory affidavit, McCord stated that Redmon said he wanted them to wear the shirts, but she was never told she had to wear a Team BET shirt.

ees to accept such insignia. As explained in *Pillowtex Corp*., 234 NLRB 560 (1978).

> When employees are approached by a supervisor and offered buttons as the ones in issue, they have only two alternatives: accept the buttons and thereby acknowledge opposition to the Union; or reject them, and thereby indicate their support of the Union. In either cases, the fact that the employees must make a observable choice is a form of interrogation. Furthermore, should employees feel compelled to choose a message opposite to their views, that is coercion and it likewise interferes with the election. [Footnote omitted.]

See also *Garland Knitting Mills*, 170 NLRB 821 (1968), enfd. in pertinent part 41 F.2d 1214, 1215 fn. 4 (D.C. Cir. 1969); *Farris Fashions*, 312 NLRB 547, 548 (1993), enfd. 32 F.2d 373 (8th Cir. 1994). The cases cited by the Company in its brief (Br. 83) are distinguishable, in that they did not involved direct supervisory solicitation of employees to take the paraphernalia.

I find, as alleged, that the Company through its managers and supervisors violated Section 8(a)(1) by distributing Team BET shirts to its employees, and encouraging and pressuring employees to wear the shirts. As discussed, both management and employees understood that the shirts conveyed an antiunion message. The evidence indicates that the Company placed greater pressure on nonunit employees to wear the shirts. The Company hoped thereby to present the unit employees with a demonstration of opposition to unionization, and to isolate and identify the core of union support within the unit. I further find that Supervisor Perkin's remarks to Sonja Goins may properly be considered as evidence as to the Company's motivation in laying off 13 named alleged discriminatees, and reducing the hours of another alleged discriminatee, on or about August 23.

The complaint does not allege that the Company acted unlawfully by retaining and utilizing the services of a labor relations consultant, or by forming Team BET, or conducting meetings and discussion groups under the aegis of Team BET, or declaring a production hiatus for the purpose of conducting such meetings, or distributing campaign literature, although counsel for the General Counsel dwelt at length on such matters in his questioning of witnesses. The complaint also does not allege that the consultant engaged in or directed unlawful conduct, and no evidence was adduced to that effect. However, the complaint does allege that the Company, through its managerial and supervisory personnel, made unlawful statements during the election campaign. In its brief, the General Counsel withdrew certain of these allegations.

With regard to the remaining allegations, I shall begin with the breakfast meeting on July 15. The complaint alleges that at that meeting, CEO Johnson: (1) threatened employees with discharge because of their union activity by telling them they should seek employment elsewhere, if they were not satisfied with terms and conditions of employment at the Company's facility; (2) threatened, coerced, and restrained the employees by telling them their support of a union was an act of disloyalty to the Company; and (3) restrained and coerced the employees by telling them they would never be represented by the Union.

The Company conducted the July 15 meeting at Four Seasons as a breakfast meeting in order to avoid violation of the Board's 24-hour rule. Vice President Lee introduced Johnson, who proceeded to address the employees. The General Counsel presented seven employee witnesses who testified concerning the meeting. In addition to Champell and Westerberg, they included alleged discriminatees McCord, Mitchell, Monroe, LeMieux, and Gretchen Stallworth. Company Officials Johnson, Lee, Redmon, and Tang testified as adverse General Counsel witnesses concerning the meeting. The Company did not present testimony about the meeting as part of its defense presentation.

McCord testified in sum as follows: Johnson said the Company's operation was profitable, the next fiscal year (August 1 through July 31, 1994) looked good, and he gave figures. He said, ''[I]f you vote for the union, you're voting against the Company, and you will be treated as such.'' He said that if the employees were not happy at Black Entertainment Television, there were other companies that would suit their need, that BET was a starting ground for opportunities in television, and that's why the pay was the way it was.

Champell testified that Johnson said he did not want to lose the money he made with the Company, if the employees did not like it there, they could go to the Discovery Channel or somewhere else, and voting for the Union would be voting against the Company.

Westerberg testified that Johnson explained how he started the Company, he wanted to make money, he acknowledged that some employees were unhappy, and he suggested they could take their talents elsewhere, and move on with their lives.

Mitchell testified in sum as follows: Johnson said he build the Company for the benefit of himself and his family, and that if the employees did not like the way the Company was run, they could go to other companies like Discovery Channel. Johnson said that the Union was not beneficial to the employees, and those employees who were interested in the Union were not committed to the Company, and would be treated as such.

Stallworth testified in sum as follows: Johnson said they were family, and the Team BET concept would work if they pulled together. He said he founded the Company for himself and his family, and anyone who didn't like working at the Company was free to leave. After Johnson spoke, he opened the meeting for questions. Stallworth asked Johnson if he foresaw repercussions against union supporters if the Union won. Johnson answered no, that they would ''put this behind us and move ahead.''

LeMieux and Monroe had minimal recollection concerning the meeting. LeMieux testified that Johnson said if they were not happy with their jobs they could go to the Discovery Channel or another broadcasting institution, or start their own company. Monroe testified that Lee and Johnson talked about benefits at the Company, and in response to Stallworth's question Johnson said something about opportunities and betterment of the Company.

Johnson testified that he told the employees in sum as follows: He did not believe that a union was in the best interests of the Company, its shareholders, or employees. He believed that the Company was providing the employees with an appropriate workplace and comparable benefits. If the employees as individuals felt they could not pursue their respec-

tive careers at the Company to maximize their individual potential, they could take their skills elsewhere. The Company had no hold on them. Johnson did not recall saying how much the Company was making, or referring to the amount of Vice President Lee's salary. He did not recall any specific questions.

Lee testified in sum as follows: Johnson said that he did not think a union was in the best interests of the employees. He said the employees could take their talents elsewhere if they were not happy at BET. He explained how much money the Company was making, and how his investment had grown, and mentioned Lee's salary.

Redmon testified that Johnson said he felt the Union was not in the Company's best interests, and all employees within the bargaining unit would be looked on as a group. Tang testified that Johnson said his purpose was to discuss his vision for the Company. She testified she throught Johnson said that if the employees were not happy at BET, they could find jobs elsewhere, but she could not recall what if anything Johnson said about the Union.

As indicated, Lee and Tang corroborated the testimony of the employee witnesses concerning what Johnson said about seeking employment elsewhere. No witness corroborated Johnson's alleged carefully worded discourse in this regard. Lee contradicted Johnson's testimony in two respects (Company profitability and Lee's salary). None of the Company officials contradicted the testimony of the employee witnesses in other respects; in particular, regarding the significance of favoring the Union. I find that the testimony of the employee witnesses together represents the substance of what Johnson said at the July 15 meeting.

I find that the Company, through Johnson, its highest official, violated Section 8(a)(1) by telling its employees that those who supported the Union were against the Company and would be treated as such. The Company further violated Section 8(a)(1) by saying, in the context of an antiunion speech, that employees who were not happy at the Company could seek employment elsewhere. Such statements constitute implied threats of discharge or other reprisal. *Kroger Co*., 311 NLRB 1187, 1200 (1993), enfd. 50 F.3d 1037 (11th Cir. 1995); *House Calls Inc*., 304 NLRB 311, 313 (1991); *Stoody Co*., 312 NLRB 1175, 1181 (1993); *Sunland Construction Co*., 309 NLRB 1224, 1235 (1992). Moreover, by advising employees who were unhappy to seek employment elsewhere, Johnson implied that it would be futile for them to seek improved conditions and redress of grievances through unionization.

The Company did not remedy these unlawful threats when Johnson told Stallworth that there would be no repercussions against union supporters if the Union won. Johnson did not withdraw his earlier remarks. Moreover, as will be discussed, Company managers made similar threats. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). I further find that Johnson's speech, including his references to Company profitability, may properly be considered as evidence concerning the Company's motivation for laying off the alleged discriminatees.

The complaint alleges that: (1) on or about July 1, Supervisory Producer Lyle Mason restrained and coerced employees by telling them they would lose their individual rights by selecting union representation; (2) on or about July 1, Executive Producer Lathan Hodge threatened employees with job loss through programming charges if they selected a union as their bargaining representative; and (3) in early July Edit Supervisor Tracey Branson solicited complaints and grievances from employees and, in so doing, made an implied promise of increased benefits and improved conditions of employment if they refrained from union organizational activity.

Ernest Champell testified in sum as follows: About July 1, Hodge addressed a meeting for nonunit employees assigned to the program ''Screen Scene.'' He said there would be no production for a 2-week period, in order to allow for Team BET meetings. Hodge said that a union would not be a good idea for the employees, because Bob Johnson did not have to agree to a union contract, and ''could basically just fire us all, and play music videos.'' He said he understood the employees were having problems, and ''it would be best to just let this Team BET go through and they would improve things.''

Champell further testified in sum as follows: Supervisory Producer Mason also addressed the meeting. Mason said he had a bad experience with unions, historically they had been racist and did nothing for African-Americans, and employees would lose their individual rights by voting for a union. Hodge and Mason then asked the employees what they ''thought about the situation going on.'' Champell said if he were a technical person he would vote for the Union, and noted that he was satisfied with union representation at a prior employer.

Samone LeMieux testified in sum as follows: David Faulks and Branson were her supervisors. About 2 weeks before the election, Branson initiated a conversation with her. LeMieux had previously asked when AB equipment in the edit suite would be upgraded. Referring to those inquiries, Branson said she did not know when, but it would probably happen soon, and said something about when things get better. Branson then asked what LeMieux throught about the Union. LeMieux answered that she had nothing against the Company or the Union, but if the Union was going to come in and help improve the situation, she was all for it. They also discussed the fact that LeMieux was not getting the benefits due her as a full-time employee, but LeMieux could not recall what was said.

Mason, Hodge, and Branson were not presented as witnesses in this proceeding. I credit the uncontroverted testimony of Champell and LeMieux.

I find that the Company, through Hodge, violated Section 8(a)(1) by threatening its employees with job loss through programming changes if they selected a union as their bargaining representative. Hodge explained his assertion that unionization would not be good for the employees, in part because Johnson could fire the employees and play music videos. The plain implication of Hodge's remark was that the Company probably would so retaliate against the employees. Therefore, Hodge made an unlawful threat. See *Guardian Industries v. NLRB*, 49 F.3d 317 (7th Cir. 1995).

It is immaterial that Hodge addressed his remark to nonunit employees, As discussed, this and other complaint allegations are not limited to conduct directly involving unit employees. Moreover, the Company's antiunion campaign was not limited to unit employees. The threat itself would apply to both technical and nontechnical employees. Hodge could also reasonably assume that word of his threat would

reach the unit employees. Hodge's threat may be considered as evidence of the Company's motivation for its personnel actions on or about August 23.

However, Supervisory Producer Mason did not unlawfully threaten the employees by telling the employees that they would lose their individual rights by voting for a union. His statement constituted permissible argument. Employees do lose certain individual rights through unionization, e.g., they cannot bypass their union and directly negotiate terms and conditions of employment with their employer. See *Tri-Cast, Inc*., 274 NLRB 377 (1985).

The Company also did not violate the Act through Edit Supervisor Branson's remarks to LeMieux. Branson did not, as alleged in the complaint, solicit employee complaints and grievances. Rather, she was responding to LeMieux's prior inquiries. Branson did not relate the matter of upgraded equipment to the outcome of the election, or to LeMieux's attitude toward unionization. By referring to ''when things get better,'' she was evidently referring to her reluctance to make specific promises during the election campaign. Although Branson asked LeMieux what she thought about the Union, the complaint does not allege that Branson unlawfully interrogated LeMieux.

B. *Alleged Unlawful Threats, Promises, and Other Coercive Statements After the Representation Election*

The complaint alleges that on or about July 23, the Company, through Executive Vice President Lee: (1) solicited employee complaints and grievances, thereby making an implied promise of increased benefits and improved terms and conditions of employment; and (2) threatened its employees with loss of jobs, and loss of jobs through changing to a format of music videos if they chose a union for collective bargaining.

Joel Westerberg testified in sum as follows: Following the election, the Company conducted several meetings of employees: At one such meeting, Vice President Lee addressed producers and assistant producers (nonunit personnel). He asked what was troubling them. The employees responded that they were underpaid. Lee answered that he couldn't give any more money, and that he could run 24-hour music videos and still make money for the Company.

Sonja Goins testified in sum as follows: She attended the same meeting, which took place on Friday, July 23. Lee asked what problems the employees might have. Most employees referred to money. Lee answered that he could ''just run videos 24 hours a day, and get rid of all of you.'' He ended the meeting by saying that he would check into their pay scale and see if he could do something about the salaries. Goins kept notes of the meeting and other developments in July 1993. Her notes corroborated her version of the meeting.

Chris Mosquera testified concerning one of several meetings at which Lee spoke. Mosquera was unable to indicate when this meeting took place. He testified that at this meeting, Lee said the Company was looking into the idea of eliminating or decreasing the amount of live programming, and going to reruns and videos and packaged programs.

Lee testified in sum as follows: Since 1989, when the Company began doing its own production, he had been telling management personnel that he was considering going to an all video production in order to decrease live program production. The Company wanted to be creative, but new programs were not always successful, and efforts at creating new programs violated the principle of keeping things simple. However, he never expressed his opinion to any employees. He did not address a meeting of employees on or about July 23, because he was in Atlanta at a family reunion from July 22 to 25. The Company introducted in evidence Lee's personal appointments calendar, which indicated he was in Atlanta at the family reunion on July 22 and 23.

David Faulks corroborated Lee's assertion that since 1990, Lee had recommended that the Company eliminate its production and go to an all-video format. However, the Company's own records contradict Lee's assertion he never said this to the employees. In one of the Company's question and answer newsletters, dated July 6, Lee responded to a question as to whether the Company was moving to an all-video formula. Lee asserted that the Company needed to generate revenue, and if it did not increase revenue, the Company must cut expenses. Lee stated that one ''format that is attractive to us is to change our on air mix to a larger and larger percentage of low cost videos.'' However, in response to other questions, Lee denied that the employees'' jobs were in jeopardy because of the production employees' support for the Union.

I credit the testimony of the employee witnesses. I find that the testimony of Goins and Westerberg together reflects the substance of what Lee said at the meeting. Goins may have erred as to the date of the meeting, but the meeting probably took place about a week after the election.

The solicitation of grievances by an employer at preelection meetings raises a rebuttable inference that the employer is promising to correct those inequities in order to discourage support for a union. *Uarco, Inc*., 216 NLRB 1 (1974). However, that inference is not present in the absence of an ongoing union organizational or election campaign. In such situations, the General Counsel must prove that the employer actually expressly or impliedly promised to correct grievances, and did so in order to discourage support for a union.

With regard to Lee's meeting with the producers and assistant producers, that meeting took place after the unit election. The meeting involved nonunion employees. Although testimony was presented concerning organizational activity by the Writers Guild during the spring of 1993, the evidence fails to indicate that the campaign was still ongoing by late July. Lee made no reference to any union in his talk. Although Lee said he would look into the pay scale, he discouraged prospects of a pay raise by saying he could not give any more money. Therefore, I find that the General Counsel failed to prove that Lee promised better pay, or that he did so in order to discourage support for any union. Indeed, the complaint does not even allege that Lee made promises for that reason. Compare withdrawn paragraphs 5 and 8 of the complaint with the instant paragraph 7(c)

The complaint allegations that Lee threatened the employees with job losses (pars. 12 and 7(d)) also fail for lack of a showing of nexus between the reference to job losses and union activity, for the reasons indicated above.

Mosquera's testimony does not appear to relate to any allegation of the complaint. Mosquera was unable to recall whether Lee made his remark before or after the election. So far as indicated by Mosquera, Lee said only what he had

been saying all along; namely, that the Company was looking into the idea of eliminating or decreasing the amount of live programming. Unlike Executive Producer Hodge, he did not purport to relate such any decision in this area to unionization. For the foregoing reasons, I am recommending that paragraphs 7(c) and (d) and 12 of the complaint be dismissed.

The complaint alleges that the Company, through Director of Engineering Jonathan Redmon, restrained and coerced its employees: (1) on or about August 20, by telling them that refusal to engage in union activity was rewarded when the Company did not issue disciplinary suspensions to employees who would have received such a discipline had they not refused to support the Union, and (2) on or about August 23, by telling them they were laid off because they chose a union to represent them for purposes of collective bargaining.

Unit employee Karen Mitchell testified in sum as follows: Shortly before her layoff on August 23, she complained to Redmon that fellow employee Rick Johnson used profanity to her. Redmon said that he was aware of such problems with Johnson, who probably would be suspended, which he recommended. Redmon summoned both employees to his office, where Johnson denied the accusation. Mitchell said that a named employee witnessed the incident. After Mitchell returned from her vacation, she learned that Johnson had not been suspended. She spoke to Redmon, who said that the witness did not corroborate her story, and in the circumstances, Johnson was given a reprimand. However, Redmon also said that Johnson went to the vice president and pleaded that he was against the Union and Mitchell was for the Union, and Redmon ''had a feeling that that might have had something to do with it.''

Redmon did not testify concerning his conversations with Mitchell. Therefore her testimony stands uncontroverted. I credit Mitchell's testimony. I find that the Company violated Section 8(a)(1) by suggesting to Mitchell that Johnson received lighter discipline, because he was opposed to the Union, and Mitchell, who made the complaint, favored the Union. See *Alexian Bros. Medical Center*, 307 NLRB 389 (1992).

Unit employee Dorothy Monroe began working for the Company in March 1989, as a master control operator. In June 1993, at her request, she transferred to work as a camera operator. Monroe testified in sum as follows: On August 24, Redmon informed her that she had been laid off the previous day (when she was not scheduled to work). She asked why she was selected for layoff (among other alleged discriminatees). Redmon said the Company looked at employees' skills, and determined that ''Doug'' (evidently Douglas McKinley) could do multiple skills. Monroe responded that she did both camera operation and master control operation, which others could not. Redmon said that if Monroe had remained as a master control operator she probably would have kept her job. He said no other master control operators were laid off. Redmon added that if the employees ''had read between the lines what management was doing,'' they ''wouldn't have been in this situation.''

Redmon, in his testimony did not contradict Monroe's version of the conversation. Redmon admitted that when he talked to Monroe about her layoff, he told her that ''she should have read between the lines.'' In explaining this remark, Redmon testified that ''the overriding point was that we really wanted the employees to have faith in management, and to look toward management to solve their problems.''

Redmon's testimony constitutes a virtual admission that he told Monroe that the Company laid off the employees because they voted in the Union. Even absent Redmon's explanation, this was the plain implication of Redmon's remark. Redmon indicated that if the employees had read between the lines, they would not have been in this situation; i.e., by doing something differently, they could have prevented the layoffs. The only thing they could have done differently was to vote against the Union. Therefore, I reject the Company's argument (Br. 92) that Redmon was simply referring to ''the host of economic circumstances and vicissitudes of a seasonal and changing business,'' over which the employees had no control.

I find that the Company, by Redmon, violated Section 8(a)(1) by indicating to Monroe that she and other employees were laid off or had their hours reduced on August 23 because the unit employees voted for union representation. His statement may properly be considered as evidence of the Company's motivation for those personnel actions.

C. *The Layoff and Reduction of Hours on August 23*

It is undisputed that on August 23, the Company laid off full-time employees Kimberly McCord, Karen Mitchell, Dorothy Monroe, Chris Mosquera, Rhonda Pope, Jay (Randy) Reid, and Gretchen Stallworth and part-time employees Olaniyi Areke, Jameeia Donaldson, Sean Hailey, Raymond Hardy, Tracey Marshall, and Sharon Shapiro and reduced Samone LeMieux from full-time to a part-time employee.

From December 1992 to late September 1993, David Faulks was production manager, with overall supervision of the production department, including the unit employees. Faulks testified that during the election campaign he participated in management meetings which included Vice Presidents Boelter and Lee and Faulk's immediate superior, Director of Engineering Redmon. Faulks testified that at such meetings, the managers discussed whether specific employees supported the Union, and identified all of the above-named alleged discriminatees except Areke as being prounion. They reached no conclusion as to Areke.

The General Counsel presented testimony by six of the named alleged discriminatees.

Kimberly McCord hosted two union meetings at her home during the organizational campaign, distributed red shirts to employees, and wore a red shirt on one occasion. At the July 15 meeting at Four Seasons, she sat with other employees who wore the red shirts. Vice President Lee testified that he was not sure whether McCord was prounion. In light of Faulks' testimony, I do not credit this assertion.

During the election campaign, Chris Mosquera questioned management about their antiunion tactics, and gave Executive Producer for News and Public Affairs Stuart Rivchun a copy of book entitled ''Confessions of a Union Buster.'' He wore prounion pins and buttons. Lee testified that he knew Mosquera was prounion.

Karen Mitchell signed a union card, attended union meetings, and hosted one union meeting at her home prior to the election. She testified that she spoke to employees and supervisors about the Union, but did not wear any union insignia.

At a Team BET discussion session, she called on Lee to make a specific commitment for improved working conditions, which he declined. Lee testified that he did not know whether Mitchell was prounion. In light of Faulk's testimony, I find that management learned that Mitchell was a union adherent.

Samone LeMieux testified that she attended union meetings, and informed employees about meetings. Lee testified that he concluded in May that LeMieux was prounion.

Dorothy Monroe testified that she signed a union card and attended union meetings. Gretchen Stallworth testified that she also attended union meetings and sometimes wore a union pin at work. Both testified they were among those wearing red shirts at the July 15 meeting at Four Seasons. Lee did not testify concerning his opinion as to whether they were prounion. CEO Johnson testified that at the July 15 meeting, he observed a group of employees seating together who were wearing colored shirts, and he assumed they were prounion.

On August 23, each of the above-named alleged discriminatees (except Monroe, who as indicated was notified the next day) was summoned to Director Redmon's office. Vice President Gordon Boelter and Redmon were present. Boelter, who read from notes, informed each of the employees except LeMieux that the Company was downsizing for financial reasons, and the employees was permanently laid off. He stated that there might be opportunities for part-time work in the future, and the Company would contact them at an appropriate time. He told LeMieux that the Company was restructuring, and cutting some shows, that she was not needed full-time, but could take part-time work or a layoff. LeMieux said she would take whatever work she could get. McCord asked how the employees were selected for layoff. Boelter and Redmon said they couldn't go into it. Security guards escorted the laid-off employees out of the facility.

In order to evaluate the Company's explanation for the personnel changes on August 23, it is necessary to consider the Company's history and supervisory structure insofar as it pertained to the unit employees.

In 1980, CEO Johnson founded the Company as a cable network, addressed to the African-American population, and particularly targeted to the young adult core of that population. Initially the Company used only prepackaged programs, did not produce its own programs and, consequently, had no technical staff.

In 1985, Johnson hired Jefferi Lee as an executive vice president. He assigned Lee to expand the Company's operations. Lee, who reported directly to Johnson, had overall responsibility for programming. The Company did expand operations, and began producing its own programs. However, the Company did not have its own facility, and used technical personnel who were empoyees of another station.

In 1989, the Company acquired its own facility, including two studios. One and later the second were made operational. The Company was now able to produce its own programs with its own personnel. Lee hired Bruce Marshall to organize a technical operation. Marshall hired a crew of permanent full-time technical employees, most of whom were new to the commercial television industry. They included studio crews, master control and edit personnel, and field crews. By September 1989 (the beginning of the 1989–1990 television season) the Company had some 25 technical employees, and was producing 5 live shows with about 30 hours of programming. The Company continued to rely heavily on prepackaged programming (music-video and sports), together with a mix of live programming which included sitcoms, news, and public affairs programming.

The Company continued to expand its live programming for the 1990–1991 and 1991–1992 seasons. In or about 1990, the Company opened a production facility in Burbank, California, with a staff of about 30 personnel. At Burbank, live programming basically consisted of one program entitled ''Live From LA.'' In May or June 1992, the Company canceled that program and concurrently reduced the size of its Burbank staff to about 18. According to Lee, the reduction was not limited to technical personnel; rather, only five or six of the eliminated positions involved technical personnel.

Meanwhile, back at the Washington, D.C. facility, Bruce Marshall left the Company. Lee replaced him with Steve Nease, whom Lee described as having technical expertise, but not a top manager. By September 1992, the Company's second studio (studio B) was fully equipped, and the Company embarked on what Lee described as an ambitious schedule. The Company added 8 new programs to its production schedule, and doubled the size of its technical staff to over 60. The Company also used some 15 to 20 free lance personnel in its production department. The Company obtained free lancers by direct contract or through referral agencies, usually on a short-term basis. Typically, free lance personnel were used for functions for which the Company did not have regular employees, e.g., makeup or set construction, or for programming outside of regular scheduling hours.

In December 1992, the Company promoted David Faulks to production supervisor. Faulks was directly to subordinate to Nease, and in overall supervision of the production department, which included the technical personnel. In January 1993, the Company canceled one of its new live programs, a dating game show called, ''Love Between the Sexes,'' which it regarded as a failure. The Company also completed shooting of another program (''Story Porch''), and substantially completed taping of another program (''Heart and Soul''), which now reverted to master control. These changes reduced the amount of live programming. However, the Company made no staffing changes or adjustment of work hours as a result of this reduction, and did not even consider such changes.

In June 1993, Lee replaced Nease with Jonathan Redmon as ''temporary'' director of engineering. Nease was transferred to a nonsupervisory position. Lee testified that he did so because ''we were having some managerial problems in that department.'' The inference is warranted, and I so find, that Lee did so because he believed Nease failed to adequately deal with the employee discontent which led to the union organizational campaign, and his apparent unawareness of that campaign, and because Lee believed that Redmon could be better deal with what the Company regarded as a crisis.

Meanwhile, the Company aired a live discussion and call-in talk show entitled ''Our Voices.'' This program aired five times a week, from Monday through Friday, in late morning.

Lee testified in sum as follows: In January 1993 he met with CEO Johnson and James Ebron, who is in charge of advertising sales, to discuss programming for the forthcoming 1993–1994 season. They expressed concern that ''Our

Voices'' was not generating much advertising revenue. Lee was aware that ''Our Voices'' had a low Neilson (audience) rating. In February, they decided to shift ''Our Voices'' to a 1-day a week program which would air on Sunday mornings. They believed that in such slot, ''Our Voices'' would attract a larger audience and consequently generate more advertising revenue. There is no written record of their decision and, initially, they told no one.

Lee further testified in sum as follows: On June 14, he conducted a weekly meeting of department heads, including Redmon and Faulks. At the meeting, it came to Lee's attention (he did not say who told him) that a production crew was doing only one show per day, which would take 2 hours of work. Lee ''exploded.'' He could not understand how they let that situation exist. Lee instructed Redmon and Faulks to find out how they let this happened. He requested them to make a complete analysis of all technical personnel and their functions and schedule. They reported back to Lee in mid-July. They informed Lee that some technical employees had only 1 or 2 hours of work per week. Lee instructed them to come up with a way of making the staff more efficient, including factoring ''Our Voices'' as a 1 day per week program. He informed them of this decision.[5] He gave no other instructions. About 2 weeks later, in late July, Redmon and Faulks returned to Lee with a proposed production schedule, personnel matrix, and ''surplus personnel list.''

Although Redmon and Faulks testified as witnesses in this proceeding, they did not corroborate Lee's testimony concerning these alleged discussions. Redmon testified that he did not learn about the planned change in ''Our Voices'' until after the July 16 election. Faulks then suggested they used a ''skills matrix'' in order to come up with a production schedule, and Redmon instructed Faulks to prepare the matrix. Faulks testified that he prepared the matrix in late June or early July, pursuant to Redmon's instruction. Faulks thereby contradicted the testimony of both Lee and Redmon. In light of the lack of corroboration of Lee's version of the sequence of events, the contradictory testimony of Lee, Redmon, and Faulks, and additional reasons which will be discussed, I find that the alleged June 14 discussion never took place, that the Company did not decide until after the election to change ''Our Voices'' to a 1-day-per-week program, and that Lee gave no pertinent instructions to Redmon and Faulks until after the election.

The documents which Faulks allegedly prepared and furnished to Redmon and Lee consisted of (1) the skills matrix, which rated the skills of each unit employee in each of 18 categories, on a scale of 1 to 4 (from lowest to highest) and a separate summary rating chart for department managers and supervisors; (2) a breakdown of hours required for each technical employee, based on the planned fall 1993 production schedule; and (3) proposed personnel changes determined on the basis of the first two documents. The third document (''Production Personnel Reorganization'') indicates that Faulks recommended layoff of full-time employees Mosquera, McCord, Stallworth, Pope, and Reid and part-time employees Marshall and Donaldson, reduction of full-time employees LeMieux, Mitchell, and Monroe to part time, and retention of Hailey, Shapiro, Hardy, and Areke as part-time employees.

Faulks testified in sum as follows: In the spring of 1993, he concluded that the Company had more technical staff than was needed for current production. He prepared the matrix in order to determine which employees were most skilled in a variety of positions, as he wished to retain those employees. He did not consult with other supervisors in preparing the matrix. He made the ratings based on his own observations. He did not consider the employees' prior experience elsewhere, or their disciplinary records. He personally sympathized with the union campaign, and did not consider the employees' attitude toward the Union.

Faulks further testified in sum as follows: He reviewed the matrix with Redmon, who suggested certain minor changes. He recommended that employees with one or no skilled positions would be laid off, and those with only two skilled positions would be offered part-time work. However, in his investigatory affidavit, Faulks stated that he worked together with Redmon to decide who would be laid off or have their hours reduced. Faulks testified that Company Human Resources Director Lynne Carter later told him that instead of the recommended personnel changes, she wanted all of the designated employees laid off, with the understanding that they could subsequently apply for part-time positions.

Lee testified in sum as follows: The Company decided to reduce the size of its technical staff because, as a result of the programming changes in January 1993, coupled with the planned reduction of programming for ''Our Voices,'' the Company had a reduced need for technical personnel. He was not involved in selecting employees for layoff or reduction of hours, or in determining the criteria for such action. Rather, he relied on Faulks' skills matrix. In consultation with the human resources director, he decided that all of the designated employees should be laid off, and subsequently be given an opportunity to apply for part-time work. The layoff was not motivated by the union election victory, and the reduction in ''Our Voices'' was not motivated by union activity. Rather, he believed that these changes would result in a more efficient and improved operation.

Lee's explanation for the personnel reduction on August 23 was inconsistent with Lee's own statements, and with the Company's own actions (including those of Lee), both before and after the layoff. Assuming a nondiscriminatory motivation, the layoffs made no sense in light of that evidence, either with regard to the layoff decision itself, or the selection of employees for layoff. Rather, the evidence tends to show a discriminatory pattern of selection.

Lee testified that even after the programming changes in January 1993, the technical employees were still kept busy, because ''We're constantly doing something.'' In one of the Company's question and answer newsletters, dated July 6, Lee responded to an employee who asserted there were positions which needed to be filled in the engineering and entertainment departments, i.e., including unit positions. Lee stated that he agreed, and that ''we now have personnel shortages,'' which ''seems to create unanticipated problems in coverage, stress, burnout, etc.'' Lee further declared that ''this situation creates a division between techs and producers,'' and ''We are working to fill the vacant positions to which you refer.'' In an earlier newsletter dated June 21,

[5] At another point, Lee testified that he told no one about the decision until a staff meeting in late July.

Lee also promised that ''Currently, we are working hard to fill vacant positions as soon as possible.''

Most significantly, during the summer of 1993, prior to the layoff, at a time when Lee was allegedly upset because there was not enough work for the unit employees, he approved hiring of seven new technical employees: Carla Peay, John Williams, Rosalyn Featherstone, and Kenneth Bentley as master control operators, Joyce Fowler as CG operator, Carlos Harper as maintenance engineer, and Dania Jolley as tape librarian.

As indicated, Faulks testified that in evaluating the unit employees, he considered only his own observation of their performance, and did not consider their prior experience. By this standard, the newly hired employees should have been the first to be laid off. Instead, Faulks simply noted in his matrix with regard to five of the seven new hires: ''Associates just beginning. Too early to evaluate.'' Jolly and Lori Jennings, hired on April 19, were not included in the matrix, and Williams was hired only 2 days before the layoff. The Company retained the new employees while laying off its experienced personnel.

Valentin Sapcariu, the Company's expert witness on television staffing and production, testified that in making staffing decisions, he would consider recent, i.e., the previous 2 years' experience, including pertinent experience with other employers. Nevertheless, according to Faulks, he disregarded such experience. By disregarding prior experience, the Company was able to rationalize its layoff of Chris Mosquera, who had long and extensive experience in a variety of technical television functions (which was known to the Company), but who also happened to be outspokenly prounion. Dorothy Monroe and Gretchen Stallworth also had prior relevant technical television experience, which Faulks assertedly disregarded.

Faulks himself had difficulty in explaining his choice as to what constituted ratable skills. Faulks testified at one point that he did not rate teleprompting, because there was no skill involved, and the Company had no such position. Faulks subsequently testified that the Company did have a position of telepromter.

Moreover, from the stand point of efficiency, it would make no sense for the Company to lay off more than one-fourth of its experienced technical employees, just as the Company was embarking on its busiest time of year, i.e., the start of a new programming season. In fact, during August, September, and October, the production department was shorthanded. Jefferi Lee testified in sum that the production supervisors were crying for help, and he accommodated them. It is undisputed that during this period, the department used an inordinarily large amount of free lance labor. In Lee's words, free lance use ''went through the roof.'' Lee testified that prior to November, supervisors had authority to hire free lance personnel on their own. However, they would not have done so unless they recognized that they needed personnel to perform the work.

In fact, the Company did not reduce the size of the unit staff. The Company continued to hire technical employees into the unit. By letter dated February 3, 1995, the Company offered Chris Mosquera reinstatement as a full-time camera operator (his previous work), ''due to the resignation of another full-time Camera Operator.'' Mosquera accepted the offer. On returning to the Company he found that the unit had five or six full-time camera operators, the same number as before the layoff. Senior Audio Engineer Robert Jackson testified that as of the time of the present hearing, he supervised a total of nine audio technicians. In August 1993, the unit included only four full-time and one part-time employee in this classification.

I find that the Company reduced Samone LeMieux from a full-time to a part-time employee, and permanently laid off the other 13 named alleged discriminatees, in reprisal for the technical employees' selection of the Union as their bargaining representative, and to demonstrate to all of its employees, the futility of selecting unionization. The Company thereby violated Section 8(a)(1) and (3) of the Act. Vice President Lee, through Director Redmon, instructed Manager Faulks to compile his ''skills matrix'' in such a manner as to rationalize the elimination of a significant number of union adherents. Redmon then designated which employees would be laid off. The selection of Areke was simply window dressing for the personnel actions against the other 13 employees, all identified as union supporters, and therefore was also unlawful. See *L. C. Cassidy & Son*, 272 NLRB 123, 131 (1984). The Company discriminatorily reduced the program ''Our Voices'' from 5 days to 1 day per week, or used that reduction as a pretext to layoff the discriminatees.[6]

On the basis of the Company's threats and other coercive statements previously discussed, the timing of the Company's personnel actions, and management preelection identification of 13 of the 14 named alleged discriminatees as union adherents, the General Counsel demonstrated that the Company reduced Samone LeMeiux from a full-time to a part-time employee, and laid off the other 13 named alleged discriminatees in reprisal for the prounion vote, and in order to discourage further union support among its employees. As the Company's asserted explanations for these personnel actions were demonstrably false or pretextual, it follow that the Company failed to meet its burden of persuasion that it would have taken those actions in the absence of a union victory.

D. *Reinstatement, Offers, and Alleged Offers of Employment to the Named Discriminatees*

David Faulks, who was no longer production manager in October 1993 (but remained with the Company until September 1994), and Human Resources Assistant Crystal Gantt, testified in sum that on or about October 1, 1993, they called or attempted to contact 12 of the laid-off employees in order to offer them part-time employment, effective October 4. Some of their testimony is disputed. I shall proceed at this point to discuss the postlayoff evidence with respect to each of the 14 individual named discriminatees.

Dorothy Monroe testified that following the layoff, she obtained full-time employment with another employer in the television industry, as a master control operator. It is undisputed that the Company did not offer her reemployment.

[6] The complaint does not allege that the Company unlawfully reduced programming of ''Our Voices.'' In his opening argument, counsel for the General Counsel stated that he was not alleging that the change was discriminatory. Therefore, it is unnecessary for me to decide whether the change itself was unlawful, or simply used as a pretext for the unlawful layoffs.

Olaniyi Areke. Grantt testified (on the basis of her notes, as with other discriminatees) that they offered Areke part-time employment of 26 hours per week, and he said he was interested. On October 4, the Company officially reinstated Areke to his former position as part-time camera operator. Company records indicate that he performed free lance work for the Company on September 3. Areke, the only named alleged discriminatee not identified as a union adherent, was still employed by the Company at the time of the present hearing.

Raymond Hardy. Gantt testified that they offered him part-time employment of 26 hours per week, and he called back to say he was interested. Company records indicate that Hardy did free lance work for the Company in September and October. His personnel file indicates that he was reinstated as a part-time employee effective October 4 and on June 7, 1995, was reclassified from a part-time to a full-time employee. Hardy did not testify in this proceeding. I credit Gantt and find that the Company's records accurately reflect his reinstatement and later reclassification.

Tracey Marshall. Gantt testified that they called Marshall and left a message offering her part-time employment of 26 hours per week. Company records indicate that Marshall did some free lance work for the Company in September. Her personnel file indicates that Marshall was reinstated to her part-time position on October 4. Marshall did not testify in this proceeding. I credit Gantt, and find that the Company's records accurately reflect her reinstatement, although she may not have actually returned to work on October 4.

Sharon Shapiro. Gantt and Faulks testified in sum that they called Shapiro, and left a message offering her part-time employment of 26 hours per week. Shapiro returned the call, saying she was unsure. Faulks testified that 1 or 2 days later he again called Shapiro, but, did not reach her. Shapiro's personnel file indicates that the Company, by letter, confirmed her reinstatement to her former position as a part-time audio technician. However, unlike personnel files of other reinstated discriminatees, her file does not contain papers, e.g., confirmation of signed tax withholding forms, or correspondence from the employee, which would indicate that she actually returned to work after August 23. Shapiro did not testify in this proceeding, and no other witness testified that she returned to the Company.

I credit the testimony of Faulks and Gantt. I find that the Company, both telephonically and by letter, offered Shapiro reinstatement to her former position, but that Shapiro, by failing to give an affirmative answer, declined the offer.[7]

Jameeia Donaldson. Gantt testified that they called Donaldson and offered her part-time employment of 16 hours per week. Donaldson said she was interested. Company records indicate that Donaldson did some free lance work for the Company in October. Donaldson's personnel file indicates that she was reinstated to her position as part-time floor director on October 4. Donaldson did not testify in this proceeding. I credit Gantt, and find that the Company's records accurately reflect her reinstatement, although she may not have reported to work.

Sean Hailey. Gantt testified that they called Hailey and offered him part-time employment of 20 hours per week. He said he was interested. Company records indicate that Hailey did free lance work for the Company on August 3 and October 23. Hailey's personnel file indicates that he was reinstated to his former position as part-time camera operator on October 4, and resigned his employment on November 4, 1994. I credit Gantt and find that the Company's records accurately reflect his reinstatement and subsequent resignation.

As indicated, Hardy, Areke, Marshall, Shapiro, Donaldson, and Hailey were all part-time employees prior to their layoff. The remaining discriminatees (LeMieux, McCord, Mitchell, Mosquera, Pope, Reid, and Stallworth) were all full-time employees.

Rhonda Pope. Faulks testified that he offered part-time employment to Pope, she accepted the offer, and she returned to work. Gantt testified that they offered Pope part-time employment of 20 hours per week, Pope said she was unsure, and Pope called back several times to ask questions about the offer. Gantt also testified that she understood that Pope decided not to take the offer. Company records indicate that Pope did free lance work for the Company in September and early October. Pope's personnel file indicates that Pope was reinstated as a part-time tape librarian on October 4. The file also indicates that February 3, 1995, the Company offered Pope employment as a full-time tape operator (a position which she held prior to the layoff), that Pope asked questions about the offer to which Human Resources Director Carter responded by letter dated February 17, 1995, and that Pope declined the offer by letter dated February 21, 1995. Pope did not testify in this proceeding.

I credit Faulks. Gantt evidently confused the situation in October 1993 with that in February 1995. The correspondence in Pope's personnel file indicates, and I so find, that Pope returned to the Company as part-time employee on October 4, 1993, subsequently left the Company's employ, was offered full-time employment in February 1995, but declined the offer.

Jay (Randy) Reid. Faulks and Gantt testified in sum that they offered Reid part-time employment of 8 hours per week, and he accepted the offer. Reid's personnel file indicates that Reid was reinstated by the Company on October 4 as a part-time video tape operator, but subsequently resigned from the Company. His resignation note states that he was resigning as of February 24, but does not indicate the year. I credit Faulks and Gantt, and find that the personnel file correctly reflects his return to work and subsequent resignation.

Gretchen Stallworth. Faulks and Gantt testified in sum that they tried to phone Stallworth to offer her part-time employment of 20 hours per week, but could not reach her. The Company made no further effort to contact her. Stallworth testified in sum as follows: She never received an offer of reinstatement from the Company. In September 1993, she changed her address. She notified the Company of the change, giving her sister's address, where she received her mail, but did not inform the Company of her new telephone number. In the spring of 1994, she requested and the Company mailed Stallworth her W–2 forms. In the summer of 1994, she moved to Chicago. I credit the testimony of

[7] Absent testimony or other evidence to the contrary, a letter sent is normally presumed to have been received, and such may be demonstrated by a file copy of the letter. Wigmore, *Evidence* IV and IX, pars. 1201 and 2519. Moreover, a valid offer of reinstatement need not be in writing. *Hickory's Best*, 267 NLRB 1274 (1983). And an employer is entitled to a definitive response within a reasonable time. *NLRB v. Pat Izzi Trucking Co.*, 395 F.2d 241 (1st Cir. 1968); *NLRB v. Betts Baking Co.*, 428 F.2d 156, 158 (10th Cir. 1970).

Faulks, Gantt, and Stallworth. The significance of their testimony will be discussed, infra.

Karen Mitchell. Faulks and Gantt testified in sum that they offered Mitchell part-time employment of 26 hours per week, and that Mitchell expressed interest. Gantt testified she told Mitchell that Faulks would call her to answer any questions she might have. Mitchell's personnel file indicates that by letter dated October 4, the Company confirmed her ''reinstatement'' to a position of part-time floor director. Mitchell never returned to work for the Company.

Mitchell testified in sum as follows: Gantt called and asked if she was interested in returning to work which would be as a floor director (her previous job). Mitchell asked what would be her hours. Gantt said she wasn't sure but would get back to Mitchell. Gantt never did. They may have discussed free lance work. Mitchell spoke to Erica Fernell, Faulk's assistant, who told her that Faulks asked her to call Mitchell and offer her a job as a part-time floor director, probably working on weekends. Mitchell questioned why she should have to work weekends, why part-time, and what would be her hours. Mitchell asked Fernell to find out and call back, but Mitchell never heard from Fernell. Mitchell received the Company's letter (dated October 4), but did not respond, because the letter was postmarked Tuesday (October 5), and told her ''to report to work'' on October 4.

I do not wholly credit Mitchell's testimony. Faulks and Gantt testified in sum, and the pattern of calls indicates, that they were together when Gantt placed the calls, and all of the employees were told that they were offered part-time employment. Mitchell evidently had additional questions, which Faulks was unable to answer at that time. The October 4 letter, like the other letters, stated that: ''Your typical work schedule will be 20–30 hours per week.'' The letter thereby partially answered Mitchell's questions. The letter did not state that Mitchell had to report on October 4. Rather, it stated that her reinstatement was effective as of that date. All of the reinstatement letters were dated October 4, and presumably received after that date. However, so far as the present record indicates, none of the employees who accepted part-time employment encountered any difficulty in returning to work. See *Esterline Electronics Corp*., 290 NLRB 834, 835 (1988).

I find that the Company offered Mitchell part-time employment, but that Mitchell, by failing to give an affirmative response and by failing to respond to the October 4 letter, declined the offer. The Company never offered full-time employment to Mitchell.

Kimberly McCord. Faulks testified that they called McCord. Gantt testified that they called McCord to offer her part-time work of 8 hours per week, and McCord said she was unsure. Gantt did not again call McCord. Gantt's notes indicate an address for McCord of 1225 Euclid Street, N.W., Washington, D.C., and a telephone number. McCord's personnel file contains copies of two letters dated October 4, and each purporting to confirm her reinstatement to a position as a part-time audio technician. The copies are identical, except that one was addressed to McCord at the Euclid Street address, and the other to McCord at 908 Sheridan Street, N.W., Washington, D.C. The file also contains a copy of a letter dated March 8, 1995, addressed to McCord at 9703 Parmalee Avenue, Cleveland, Ohio, offering McCord reinstatement as a full-time audio technician (the work which McCord did prior to her layoff). The letter asserted that the position because available due to the resignation of another full-time audio technician. The letter requested McCord to respond by March 22, 1995.

McCord testified in sum as follows: When she began working for the Company (initially as a free lancer) she lived on 21st Street in Washington, D.C. In April or May 1992, she moved to the Euclid Street address, where she remained until November 1994. She notified the Company of her change of address. She lived in Cleveland, Ohio, from September 1994 to January 1995. On September 27, 1993, Gantt called her and said she was offering McCord part-time work. Gantt asked McCord if she received a letter from Faulks. McCord said she did not and would have to think about the offer. She gave Gantt her address. McCord did not thereafter receive any call or letter from the Company. She specifically denied receiving the October 4 letter addressed to her home address. She did not try to contact the Company.

By certified letter dated February 3, 1995, similar to the March 8, 1995 letter in McCord's personnel filed, but sent to her at her former 21st Street address, the Company offered McCord reinstatement to a full-time position as audio technician, and requested her to respond by February 16, 1995. McCord testified that her mother forwarded the letter to her (thereby indicating that her mother lived at that address). McCord did not contact the Company, but simply notified her attorney of the offer. All of her contacts with the Company were through her attorney. By fax dated March 8, the Board's Regional Office notified Company counsel of her Cleveland address. As indicated, McCord was no longer living in Cleveland at that time. She testified that she did not know how the Regional Office got her address.

As indicated, McCord admitted that she received an oral offer of part-time employment, but did not respond to the offer, other than to say she had to think about it. She also admitted that she received the Company's February 1995 offer of reinstatement to a full-time position, but never responded to that offer. In view of McCord's denial that she received any written offer of a part-time position, and the unexplained copies of October 4 letters in her file to two different addresses, I am not persuaded that McCord received any written offer of part-time employment. However, I find that by failing to respond to the September 27 verbal offer of part-time employment, and the February 3, 1995 offer of full-time employment, she declined both.

Chris Mosquera. Faulks and Gantt testified in sum that they called Mosquera and offered him part-time employment as a camera operator of 16 hours per week, Mosquera said he was interested, and returned to work. Mosquera's personnel file contains a letter confirming his ''reinstatement'' to a position of part-time camera operator, effective October 4. Company records indicate that Mosquera performed some free lance work for the Company on September 26 and October 2.

Mosquera testified initially that several weeks after the layoff, a person from the Company, whose name he could not recall, invited him to sign a free lance contract. Mosquera subsequently testified that Faulks offered him a free lance arrangement. However, by letter dated September 19, Mosquera offered the Company his services as a free lance contractor. On September 24, Mosquera executed a free

lance contract with the Company, but was not called for free lance work after October 1993.

I find that Mosquera opted to work for the Company on a free lance basis. I credit the testimony of Faulks and Gantt that they offered him part-time employment. As discussed, their testimony and the pattern of calls indicates that they offered part-time employment to all contacted employees. In view of the September 24 contract, it is unlikely that the Company thereafter offered him only free lance work. The inference is warranted, and I so find, that Mosquera expressly or impliedly declined the offer, preferring to work on a free lance basis.

By letter dated February 3, 1995, the Company offered Mosquera full-time employment as a camera operator (the work which he performed prior to his layoff). By letter dated February 13, 1995, Mosquera asked why the Company was making this offer. By letter dated February 21, 1995, the human resources director responded as indicated in her February 3 offer that such position became available (due to resignation of another full-time camera operator). By letter dated February 25, 1995, Mosquera accepted the offer. The Company renewed the offer by letter dated March 8, 1995. Mosquera returned to work on March 27, 1995, and was still employed by the Company at the time of the present hearing.

Samone LeMieux began working for the Company in October 1992. Beginning in December 1992, she worked 40 hours per week, but did not receive the benefits of a full-time employee. In June 1993, responding to her repeated complaints, the Company officially classified her as a full-time employee, with a full-time pay rate retroactive to February 1.

As discussed, on August 23, the Company told LeMieux that she could take either part-time work or a layoff, and she said she would take whatever work she could get. The Company initially designated her working hours as being from 6:30 to 10:30 p.m., but subsequently informed LeMieux that her working hours were from 4 to 10:30 p.m., Monday through Friday. Prior to August 23, LeMieux had done both cuts editing and AB editing. Thereafter, she did only AB editing. Among six edit employees, LeMieux was the only one not assigned to a daytime schedule.

LeMieux testified that she looked elsewhere for free lance work, and consequently was sometimes late or failed to show up for work at the Company. By memo dated September 30, the Company warned LeMieux that her attendance record was unacceptable, and that failure to improve her attendance would result in further discipline, including termination. By letter dated October 20, the Company informed LeMieux that she was terminated for absence without leave on October 18, 19, and 20, and failure to report to work without advance notice to her supervisor.

In his brief, at footnote 56 on page 61, the General Counsel requests leave to amend the complaint to allege that the Company violated Section 8(a)(1) and (3) by constructively discharging LeMieux. The request is denied, for failure to give adequate notice to Respondent that this would be an issue in the case. Compare *Old Man's Home of Philadelphia*, 265 NLRB 1632, 1641 (1982), revd. on other grounds 719 F.2d 683 (3d Cir. 1983).[8] The standards for determining constructive discharge are not the same as those for determining whether the employer has made a valid and adequate offer of reinstatement. There are two elements which must be proven to establish a constructive discharge. First, the burdens imposed on the employee, measured by the ''reasonable person'' standard, must cause, and be intended to cause, a change in her working conditions so difficult or unpleasant as to force her to resign. Second, it must be shown that those burdens were imposed because of the employees' union activities. See *Hit N' Run Food Stores*, 231 NLRB 660 (1977), and cases cited therein. Had I known that the General Counsel intended to allege a constructive discharge on October 20, I would have received LeMieux's testimony concerning her circumstances after August 23. See Tr. 457–458. Assuming that it were necessary to decide the matter, I would find on the present record that the General Counsel failed to prove that LeMieux was constructively discharged on October 20.

I find that the Company failed to make adequate offers of reinstatement at any time to Monroe, Reid, Mitchell, and LeMieux. Prior to August 23, all were full-time employees. The Company's offer of part-time work to full-time employees was inadequate for remedial purposes. See *Sobeck Corp*., 321 NLRB 259 (1996); *Marlene Industries Corp*., 234 NLRB 285, 291 (1978).

With regard to Monroe, the fact that Monroe obtained other employment did not excuse the Company from its obligation to offer her reinstatement to her former job. Monroe never told the Company that she did not want an offer of reinstatement. Although she might not have accepted the offer, the decision was hers, and not the Company's.

With regard to Stallworth, the Company not only failed to offer her full-time employment, but also failed to make an adequate good faith effort to even offer her part-time work. The Company simply tried to reach her by phone. Although the Company had her mailing address, the Company never sent her a letter of offering her any kind of employment. See *Reeves Rubber, Inc*., 252 NLRB 134 fn. 2 (1980); *Portage Plastics Co*., 163 NLRB 753 (1967). Although Stallworth moved to Chicago in the summer of 1994, this did not (as with Monroe) excuse the Company from its obligation to offer her full reinstatement. Moreover, the evidence in this case indicates that it was common for employees in the industry to move from one area to another in order to take employment.

The Company never offered LeMieux reinstatement to her position as a full-time videotape operator. Therefore, her discharge from her part-time position did not operate either to terminate the backpay period, or excuse the Company from its obligation to offer LeMieux reinstatement to her former position, regardless of whether the discharge was lawful. See *Carter's Rental*, 250 NLRB 344, 347 (1980), enfd. 688 F.2d 847 (9th Cir. 1982).

For the reason discussed, I find that the Company did not make a valid offer for remedial purposes, by offering part-time work to full-time empoyees Pope, McCord, and Mosquera. However, the Company's offers of full-time employment to these employees on February 3, 1995, constituted valid offers of reinstatement which were adequate for

[8] This was not the only instance in which matters were raised in footnotes or text buried deep in the recesses of an 85-page brief, which should have been presented by timely motion or other notice which would enable Respondent to respond or react accordingly. See also G.C. Br., fns. 19, 64, and 65, and text at p. 27.

remedial purposes. In each instance, the Company offered the employee immediate and full reinstatement to a position substantially equivalent to that which each formerly held with ''the same rate of pay and level of benefits to which you would have been entitled had your employment with BET been uninterrupted,'' and ''a schedule consisting of approximately the same number of hours which you previously worked at BET.'' See *M. J. Pirolli & Sons*, 194 NLRB 241, 247 (1972), affd. 80 LRRM 3170 (1st Cir., 1972).[9]

As previously discussed, the Company offered reinstatement to each of the former part-time discriminatees: Areke, Hardy, Marshall, Donaldson, Hailey, and Shapiro. The offers were valid and adequate for remedial purposes. See *Retail Delivery Systems*, 292 NLRB 121, 124 (1988).

In sum, I am recommending that the Company be ordered to offer reinstatement to Monroe, Reid, Stallworth, Mitchell, and LeMieux. All of the named discriminatees are entitled to reimbursement for any loss of earnings and benefits they may have suffered from the time of their layoff (or in the case of LeMieux, from the time of her reduction to part-time status), to the date of the Company's proper offer of reinstatement.

E. *Alleged Unlawful Reduction of Hours of Named Discriminatees Who Returned to Work and of Other Employees Not Named in the Complaint*

The complaint alleges, and the Company's original answer admitted, that on or about August 23, the Company permanently laid off, temporarily laid off, or reduced the hours of the named alleged discriminatees, and ''possibly other employees not known to the undersigned.'' The complaint alleges, and the answer denies, that the Company did so because named and unnamed employees formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

The first complaint allegation (par. 14) insofar as it refers to unknown employees is so broad and vague as to be largely meaningless. Anything is possible. On its face, the allegation could apply to nonunit employees, in Washington, D.C., or Burbank, e.g., Sonja Goins. Therefore, I attach no significance to the Company's admission in its answer.

At the tentative close of the hearing, I requested counsel for the General Counsel to identify the unnamed alleged discriminatees. I did not do so earlier, in deference to the General Counsel's repeated assertions that the Company failed to produce payroll or other subpoenaed documents. The General Counsel subsequently submitted a list of 60 named individuals who in addition to those named in the complaint, allegedly suffered a discriminatory loss of hours. The list included, but was not limited to most of the unit employees. The General Counsel does not allege that any unnamed employees were discriminatorily laid off.

The Company filed a response, demonstrating that many of the listed individuals were nonunit employees, salaried personnel, or no longer employed by the Company on August 23. Having the benefit of the Company's position, the General Counsel, by its posthearing brief, withdrew 23 names from the list (identifying them only by omission from the General Counsel's attachment A), leaving 37 additional alleged discriminatees.

David Faulks testified in sum that apart from the layoffs and reduction to part-time status of LeMieux, the Company did not reduce the hours of any unit employee on or about August 20, 1993. The General Counsel presented no testimonial evidence that the Company otherwise reduced the hours of any unit employee on or about or after August 23. Chris Mosquera, the only witness who worked as a unit employee after the layoff, in the same capacity as before the layoff, did not claim that his hours were reduced after his reinstatement as a full-time employee. Olaniyi Areke, Raymond Hardy, and Sean Haley worked as part-time employees in their respective job categories both before and after the layoffs. Therefore, they might have been able to shed light on the question of whether there was a reduction in hours. Nevertheless, the General Counsel did not call any of them as witnesses.

Rather, the General Counsel bases his assertion on his analysis of Company payroll records. In support of this position, the General Counsel attached to his brief, as attachment A, a purported comparison of regular and overtime hours worked by the 37 additional alleged discriminatees during September, October, November, and December 1993, with such hours worked for the same months of 1992. For those alleged discriminatees who began working for the Company in 1993, the General Counsel used, as a questionable basis for comparison, average hours worked by employees in the same job classification during the last 4 months of 1992. Attachment A does not include any of the laid off part-time employees who were subsequently recalled to part-time work.

The General Counsel failed to present any testimony as to how this analysis was compiled. Therefore, there is no assurance that the analysis is correct, except by comparison to Respondent's proffered analysis (R. Br. 72–73) which may be regarded as admissions by Respondent. Assuming the General Counsel's analysis to be correct, i.e., viewing the evidence in a light most favorable to the General Counsel, I find that the evidence fails to demonstrate any significant overall pattern of reduction of hours, or reduction for discriminatory reasons, or that known union adherents were singled out for discriminatory treatment.

The General Counsel's analysis is significant for those names which are not included in attachment A. As indicated, the General Counsel did not include any of the laid off part-time employees who were subsequently reinstated to part-time work. The General Counsel also failed to include unit employee Clifford Newman, who was union observer at the July 16 election. The General Counsel initially included Newman in his list of 60 additional alleged discriminatees. Although Respondent did not challenge the propriety of including Newman on the list, the General Counsel, without explanation, deleted Newman as an alleged discriminatee.

[9] The fact that Mosquera accepted the Company's offer and was restored to his former position tends to indicate that the offers were made in good faith. *Leprino Cheese Mfg. Co.*, 170 NLRB 601, 607 (1968). In its letters of February 3, 1995, the Company asserted that it was offering reinstatement to a ''substantially equivalent position'' because ''your position . . . was eliminated due to programming changes effected in August 1993.'' As found, the Company unlawfully ''eliminated'' the employees' positions. However, although worded in this manner, the offers of reinstatement were valid and adequate for remedial purposes. See *NLRB v. National Food Stores*, 332 F.2d 249, 254–255 (7th Cir. 1964).

The inference is warranted, and I so find, that if the General Counsel had included these employees in his analysis, the figures would fail to show that the employees suffered any reduction in working hours.

The General Counsel's analysis begins with a serious and misleading mathematical error. Kenneth Bentley was hired by the Company as a unit employee on July 9, 1993. The General Counsel's analysis purports to indicate that by comparison with employees in his classification, Bentley suffered a loss of 129 regular working hours, amounting to about 20 percent of what should have been his total regular hours. In fact, the figures indicate loss of only 32.6 hours (about 5 percent) and no loss in overtime hours.

Among those unit employees who were employed by the Company in 1992, the General Counsel's analysis indicates that two of the three who sustained the greatest loss in working hours, were identified by the General Counsel's witnesses as being antiunion or associated with management. The figures indicate that Ricardo Johnson sustained a loss of more than 10 percent of regular hours, and all overtime work (79 hours in the 1992 period). The figures also indicate that Quinn Hazelwood sustained loss of nearly 10 percent of regular hours, and total loss of overtime work (78 hours). As indicated, Karen Mitchell testified in sum that Johnson identified himself to management as being opposed to the Union, and thereby avoided a disciplinary suspension. Kimberly McCord testified that Hazelwood, whom she referred to as ''director of video,'' shared an office with Supervisors Jackson and Redmon, and indicated that she regarded him as an agent of management. (The third employee was Ofon Samson. The record fails to indicate his attitude toward the Union.)

The General Counsel's analysis fails to indicate that any other alleged discriminatees sustained losses of 10 percent of more in regular working hours. The figures indicate that several employees sustained negligible or no net loss in hours or gained income by reason of increased overtime. They included: Orin Britton, identified by Vice President Lee as being prounion; Timothy Droll, who worked more regular hours but less overtime; William Harper, who worked 28 hours less on regular hours (less than 5 percent loss) but worked 12 hours more of overtime; Kelly Hosey, who worked 25 hours less on regular time (about a 4-percent loss) but worked 5 more hours of overtime; Charles Montgomery, who worked 27 hours less on regular time (about a 4-percent loss), but continued to work substantial overtime (79 hours for each period); Michael Mosley, who lost only 10 hours of regular time (a loss of less than 2 percent) but worked an additional 14-1/2 hours of overtime; Elise Perry, who lost 10 hours of regular time (less than 2 percent) but lost only 1 hour of substantial overtime; Donna Pettis, who lost 9 hours of regular time (less than 2 percent) but worked 20 hours of overtime during the 1993 period, although she had no overtime during the 1992 period; Jean Renauld, who lost 4 hours of regular time (less than 1 percent, and about 12 hours of substantial overtime (from 78 to 66 hours); Wendy Sherrill, who lost 33 hours of regular time (about a 5-percent loss), but worked 6 hours more of overtime; Katrina Stanfford, who worked 5 hours less on regular time (a loss of less than 1 percent) and 2 hours less overtime; Arthur Thomas, who worked 33 more regular hours, but 51 less of overtime; and Kenneth White, who worked 21 hours less on regular time (a loss of about 3 percent), and 3 hours less on overtime.

As indicated, Thomas worked more regular hours but fewer overtime hours. Among the remaining alleged additional discriminates: Wanda Burnett worked more regular hours but less overtime, Bobby Byrd worked 16 hours less on regular time (a loss of about 2-1/2 percent) and lost about 13 hours of overtime; Jana Drewery worked 13 hours less on regular time (about a 3-percent loss), but less overtime; David Grain worked 10 less regular hours (less than 2-percent loss), but substantially less overtime; Andre Parker worked 21 hours less on regular time (about a 3-percent loss), but significantly less overtime; Anthony Pittman worked 18 hours less on regular time (less than 3-percent loss) but significantly less overtime; Theodore Thornton worked 7 less regular hours (a loss of about 1 percent) but lost substantial overtime; Erin Williams worked 23 hours less on regular time (about a 3-percent loss), but lost overtime; and Rodney Wooten worked 3 hours more on regular time, but lost substantial overtime.

In sum, the employees discussed in the foregoing paragraph sustained no significant loss of regular hours, or worked more regular hours in the 1993 period than they did during the 1992 period, but sustained significant loss of overtime work. For purposes of this case, I am unable to attach significance to the overtime losses for these or any other alleged discriminatees. The evidence does not indicate whether overtime was mandatory or voluntary. Therefore, it cannot be determined from the present record whether the employees lost overtime, because it was not assigned to them, or because they declined proffered overtime. Moreover, the evidence indicates that prior to the July 16 election, the Company embarked on an intentional policy of reducing overtime. In a question and answer newsletter dated July 1, Vice President Lee replied to an employee complaint that: ''Since overtime was reduced, all departments have faced personnel shortages.'' Lee responded that: ''In an effort to reduce our payroll expenses, a decision was made to limit overtime.'' Therefore, the evidence indicates that the decline in overtime from 1992 to 1993 came about the result of a nondiscriminatory policy initiated by the Company well before the election.

Among the 11 remaining additional alleged discriminatees, 7 were employed as unit employees during the last 4 months of 1992; James Bolling, Teresa Hudnall, Charlie Jones, Douglas McKinley, Darryl Player, Tracy Shives, and Joseph Westbrook. Vice President Lee identified McKinley and Westbrook as being prounion. The evidence fails to indicate the union attitude of the other five employees. The General Counsel's analysis indicates that each had from 5 to 10 percent fewer regular hours in 1993 than in 1992. McKinley had slightly more overtime in 1993 than in 1992. Westbrook, the other identified union adherent, worked 55 overtime hours during the 1993 period. This was the 7th highest figure among the 37 employees in the General Counsel's analysis.

The remaining additional alleged discriminatees (Rosalyn Featherstone, Carlos Harper, Lori Jennings, and John Williams) plus Kenneth Bentley, began working for the Company in 1993. I cannot agree that a loss of hours can be determined by comparison with average hours worked by employees in the same job classification in 1992. The evidence fails to indicate that the Company had any equalization of

hours policy. The General Counsel offered no comparison of these employees' working hours before and after August 23. Employees cannot lose what they never had. The normal working hours of these employees were the hours which they worked after they were hired.

In view of the absence of any significant reduction in regular working hours from 1992 to 1993, the nondiscriminatory explanation for why some employees had fewer overtime hours, and the absence of evidence that antiunion employees were favored or prounion employees discriminated against in assignment of number of working hours (except as found with respect to employees named in the complaint), the General Counsel failed to demonstrate (except as previously found), that the Company discriminatorily reduced the working hours of unit employees. Therefore, I am recommending dismissal of the pertinent allegations of the complaint insofar as they allege otherwise.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily laying off Olaniyi Areke, Jameeia Donaldson, Sean Hailey, Raymond Hardy, Kimberly McCord, Tracey Marshall, Karen Mitchell, Dorothy Monroe, Chris Mosquera, Rhonda Pope, Jay (Randy) Reid, Sharon Shaprio, and Gretchen Stallworth, and discriminatorily reducing Samone LeMieux from a full-time employee to a part-time employee, thereby discouraging membership in the Union, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. The General Counsel failed to prove by a preponderance of the credible evidence that the Company otherwise reduced the working hours of its technical employees.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Company be ordered to offer Karen Mitchell, Dorothy Monroe, Jay (Randy) Reid, Gretchen Stallworth, and Samone LeMieux, immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of the 14 above-named discriminatees whole for any loss of earnings and benefits that they may have suffered from the time of their layoff or reduction in status to the date of the Company's offer of full reinstatement. I shall further recommend that the Company be ordered to remove from its records any reference to their unlawful terminations, to give each of them written notice of such expunction, and to inform them that its unlawful conduct will not be used as a basis for further personnel actions against them. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[10] It will also be recommended that he Company be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Black Entertainment Television, Inc., Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in International Brotherhood of Electrical Workers, Local 1200, AFL–CIO, or any other labor organization, by discriminatorily laying off or reducing the working hours of employees, or in any other manner discriminating against them with regard to their tenure of employment or any term or condition of employment.

(b) Threatening employees with job loss if or because they support a union as their bargaining representative, or so threatening by telling employees that those who support a union are against the Company and will be treated as such, or by telling employees that those who are not happy at the Company can seek employment elsewhere.

(c) Coercing or restraining employees by telling them they were laid off because they chose or otherwise supported a union as their bargaining representative, or telling them that refusal to engage in union activity was or would be rewarded by favorable personnel action or policy.

(d) Restraining, coercing, and interrogating employees by distributing to its employees Team BET shirts or other paraphernalia opposing union activity, or encouraging empoyees to wear such paraphernalia.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Karen Mitchell, Dorothy Monroe, Jay (Randy) Reid, Gretchen Stallworth, and Samone LeMieux, immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them and Olaniyi Areke, Jameeia Donaldson, Sean Hailey, Raymond Hardy, Kimberly McCord, Tracey Marshall, Chris Mosquera, Rhonda Pope, and Sharon

[10] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Shapiro whole for losses they suffered by reason of the discrimination against them as set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful reduction in status of Samone LeMieux, and the layoffs of the other 13 above-named employees, and within 3 days thereafter notify them in writing that this has been done and that the personnel actions will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Washington, D.C., facility copies of the attached notice marked ''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 1993.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in International Brotherhood of Electrical Workers, Local 1200, AFL–CIO, or any other labor organization, by discriminatory laying off or reducing the working hours of employees, or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT threaten you with job loss if or because you support a union as your bargaining representative, or so threaten you by telling employees that those who support a union are against us and will be treated as such, or by telling employees that those who are not happy at BET can seek employment elsewhere.

WE WILL NOT coerce or restrain you by telling employees they were laid off because they chose or otherwise supported a union as their bargaining representative, or telling them that refusal to engage in union activity was or will be rewarded by favorable personnel action or policy.

WE WILL NOT restrain, coerce, or interrogate you by distributing to our employees Team BET shirts or other paraphernalia opposing union activity, or encouraging employees to wear such paraphernalia.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise your right to engaged in union or concerted activities, or to refrain therefrom.

WE WILL offer Karen Mitchell, Dorothy Monroe, Jay (Randy) Reid, Gretchen Stallworth, and Samone LeMieux immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them and Olaniyi Areke, Jameeia Donaldson, Sean Hailey, Raymond Hardy, Kimberly McCord, Tracey Marshall, Chris Mosquera, Rhonda Pope, and Shanon Shapiro whole for any losses they suffered by reason of the discrimination against them, with interest.

WE WILL expunge from our files any reference to the unlawful reduction in status of Samone LeMieux, and the layoffs of the other 13 above-named employees, and notify them in writing that this has been done and that evidence of our personnel actions will not used against them in any way.

BLACK ENTERTAINMENT TELEVISION, INC.